

Marquette Law Review

Volume 18

Issue 2 February 1934

Article 9

Equity: Constitutional Law: Law Dispute

Caroline Agger

Ernest O. Eisenberg

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Caroline Agger and Ernest O. Eisenberg, *Equity: Constitutional Law: Law Dispute*, 18 Marq. L. Rev. 136 (1934).

Available at: <http://scholarship.law.marquette.edu/mulr/vol18/iss2/9>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

EQUITY—CONSTITUTIONAL LAW—LABOR DISPUTE.—Action by plaintiffs to enjoin defendants from picketing plaintiff's restaurant. From an interlocutory order refusing to grant a temporary injunction plaintiffs appeal. The facts show that because of a refusal by plaintiffs to employ only union help in their restaurant, defendants called a strike, picketed the restaurant, and induced union truck drivers to refuse to deliver supplies to plaintiffs. Plaintiffs allege that the picketing resulted in a reduction of receipts from \$50 to \$65 per day. *Held*, order affirmed. *Scofes et al. v. Helmar et al.*, (Ind., 1933) 187 N.E. 662.

The question raised in this case was whether the court could enjoin peaceful picketing when it resulted in loss to the plaintiffs' business. The court held that such picketing was legally justified and if lawfully conducted could not be enjoined, even though it may have caused pecuniary loss to the business picketed. In accord: *Karges Furniture Co. v. Amalgamated, etc. Union*, 165 Ind. 421, 75 N.E. 877, 2 L.R.A. (N.S.) 788, 6 Ann. Cas. 829 (1905); *Thomas v. City of Indianapolis*, 195 Ind. 440, 145 N.E. 550, 35 A.L.R. 1194 (1924); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 42 Sup. Ct. 72, 66 L.Ed. 189, 27 A.L.R. 360 (1921); *Stillwell Theater, Inc. v. Kaplan*, 259 N.Y. 405, 182 N.E. 63, 84 A.L.R. 6 (1932). Not all courts view picketing in this way and will enjoin admittedly lawful and peaceful picketing. *Clarage v. Lufhringer*, 202 Mich. 612, 168 N.W. 440 (1918); *Baldwin Lumber Co. v. Local 560*, 91 N.J. Eq. 240, 109 Atl. 147 (1920).

The Indiana Supreme Court felt that no rights of the plaintiffs were violated by the picketing; that the plaintiffs as owners of a restaurant had no inherent property right to the patronage of their customers. If a restaurant underpays its help and seeks to take advantage of a surplus in the labor market, its employees have the right to advertise this treatment to the public, and to inform the patrons of the restaurant that the employers are unfair to organized labor. *S. A. Clark Lunch Co. v. Cleveland, etc., Local 106*, 22 Ohio App. 265, 154 N.E. 362 (1926). "The fact that such action may result in incidental injury to the employers does not in itself constitute a justification for issuing an injunction against such acts." *Stillwell Theater, Inc. v. Kaplan*, *supra*. The patrons, having been informed of the facts, have the choice of continuing their patronage or not. If they discontinue it, the employer suffers a loss in decreased receipts.

Because the Indiana Court did not regard the right to patronage as a property right, its refusal to grant an injunction does not constitute a deprivation of plaintiff's property rights under the Fourteenth Amendment to the United States Constitution. Courts are by no means unanimous on this point. Many of them feel that this right of patronage, to do business unhampered, should be protected and will call it a property right. *Truax v. Corrigan*, 257 U.S. 312, 42 Sup. Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375 (1921). In this case a statute (1464 Revised Stat. of Arizona, 1913) prohibiting the issuing of an injunction in labor disputes was held unconstitutional.

The court will often say that there must be lawful picketing carried on for a lawful purpose. *Truax v. Corrigan*, *supra*. The determination of what is a lawful object gives the courts a great deal of latitude. Picketing to force an employer to take back employees he has laid off has been called unlawful, *Benito Rovira Co. v. Yampolsky*, 187 N.Y.S. 894 (1921). Picketing to compel an employer to allow his mines to be unionized is also unlawful, *Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 229, 38 Sup. Ct. 65, 62 L.Ed. 260, L.R.A. 1918C, 497 (1917).

The distinction between lawful or peaceful and unlawful picketing also gives the courts an opportunity to exercise considerable judicial discretion. Where

there is unlawful picketing the courts will enjoin it to prevent irreparable injury to property and property rights. However, in so doing, they will frequently have to make fine distinctions between peaceful persuasion and annoyance, moral coercion and intimidation. *Truax v. Corrigan*, supra.

The Wisconsin legislature tries to make this distinction between lawful and unlawful picketing and in 1931 legalized peaceful picketing. Thus section 268.20, (1), (e), Wis. Stats., provides that "Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, *without intimidation or coercion*, (italics writer's) or by any other method not involving fraud, violence, *breach of the peace*, (italics writer's) or threat thereof" shall be legal. Subsection (2) of the same section provides that "No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts." (i.e., peaceful patrolling and picketing, etc.). It is hardly necessary to point out how much room for judicial discretion remains, and necessarily so.

There has been in the past a blind abuse of the injunction power by the courts, resulting in greater class hatred, and in more contemptuous disrespect for justice than ever before. Statutes such as the above and the Federal Statute passed in 1921 limiting the courts somewhat in their power to grant injunctions in trade disputes, combined with a more liberal public opinion and a more socially minded judiciary than has existed in the past, are leading to a more impartial adjudication of labor disputes.

CAROLINE AGGER,
ERNEST O. EISENBERG.

SURETYSHIP—DEFENSES OF SURETY—ESTOPPEL.—By the terms of a trust agreement the creditors of a construction company agreed to be paid pro rata from the proceeds of a proposed mortgage and to furnish materials needed for the completion of a building on land owned by the company. The plaintiff, a creditor, executed the agreement only because the defendant, a trustee, guaranteed, individually, to pay the balance of its account remaining unpaid after the distribution of the balance of the proceeds of said mortgage. The materials were furnished and the work of completion started. The mortgagee of the proposed mortgage could not advance the funds. The trustees, without knowledge or consent of the plaintiff, negotiated in place of the proposed mortgage another mortgage of larger denomination. The proceeds of this mortgage were insufficient to meet the necessary disbursements and the creditors received nothing. The plaintiff sued on the guaranty. Motions for nonsuit and directed verdicts by both parties were refused. The jury returned a verdict for the plaintiff covering its full account. From the judgment the defendant appeals on grounds of improper submission to the jury. *Held*, that the case was properly submitted to the jury. Judgment affirmed. *Mosaic Tile Co. v. Jones*, (N.J. App., 1933) 168 Atl. 629.

The defendant for one defense contended that the placing of a new and larger mortgage released his obligation on the guaranty. A variation from the terms of the original contract is different from an alteration. An alteration of a material character releases the guarantor because the contract is destroyed. A variation from the terms of the contract gives the surety an equitable defense.